IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 23RD AUGUST 2007 / 1ST BHADRA 1929

SA.No. 560 of 1994()

AS.7/1993 of PRL.S.C.,THALASSERY
OS.329/1989 of PRL.M.C.,KANNUR
.....
APPELLANT: APPELLANT:1ST DEFENDANT:

KOLANGARATH PADMANABHAN,
S/O.CHANDUKUTTY,
CHIRAKKAL AMSOM, PUZHATHI DESOM, KANNUR.

BY ADV. SRI.V.R.VENKATAKRISHNAN (SR.)
SRI.N.C.JOSEPH
SRI.S.ANANTHAKRISHNAN

RESPONDENTS:
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1. **KAMBARATH OMANA ALIAS SAROJINI,**
   D/O.LAKSHMI AMMA, KAMBRATH HOUSE,
   POST PAYANGADI R.S, KANNUR.

2. **THANKAM, D/O.....DO....DO....**

3. **BALAKRISHNAN, S/O...DO...DO...**

4. **GANGADHARAN, S/O...DO...DO.....**

5. **RAMACHANDRAN, S/O...DO...DO....**

6. **RUGMINI, D/O...DO....DO.....**

7. **VELAYUDHAN, S/O.DO...DO...**

8. **KAMBRATH SREEDHARAN,**
   S/O.LAKSHMI, CHIRAKKAL AMSOM, PUZHATHI DESOM, KANNUR.

9. **SREE PAZHAPARAMBATH PUTHIYA BHAGAVATHI KSHETHRA COMMITTEE BY ITS PRESIDENT, V.V.KRISHNAN NAIR, S/O.GOVINDAN, CONTRACTOR, PUZHATHI KANHIRATHERU, CHIRAKKAL, KANNUR.**

BY ADV. SRI.O.RAMACHANDRAN NAMBIAR
SMT. SHEEJA DIVAKARAN for R1 to R4 & R7
SRI.V.RAJAGOPAL for R6

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 23/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 560 OF 1994

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DATED THIS THE 23rd DAY OF AUGUST, 2007

JUDGMENT

First defendant in O.S. 329 of 1989 on the file of Munsiff Court, Kannur is the appellant. Plaintiffs are respondents 1 to 7 and other defendants, the other respondents. Respondents/plaintiffs instituted the suit seeking a declaration that they and eighth respondent/second defendant are the legal heirs of deceased Parvathi Amma and Ext.A4 and A5 orders passed by Tahsildar and Sub Collector dated 8.9.1987 and 18.7.1988 are erroneous and illegal. Their case was that they are the children of Kambrath Lakshmi Amma and Lakshmi Amma is the sister of Parvathi Amma who died on 4.4.1974 and Parvathi Amma had only one daughter Ammalu who died as spinster and Uchira amma was the mother of Lakshmi Amma and Parvathi Amma and when Parvathi Amma died, Uchira Amma was not alive and Parvathi Amma's only legal representatives are plaintiffs and second defendant and Parvathi Amma had an item of property at Chirakkal which was alloted to her and Ammalu under Ext.A1 partition deed in 1957. That property exclusively belonged to Parvathi Amma as she got

released the rights of her daughter Ammalu and subsequently under Ext.A2 assignment deed Parvathi Amma transferred her one half right in favour of Lakshmi Amma and after the death of Parvathi Amma her properties belonged to plaintiffs and second defendant and Chandukutty Nair was the Uncle of Parvathi Amma and he was occupying the northern property and after the death of Parvathi Amma, plaintiffs tried to pay the property tax and then they were informed that first appellant, son of Chandukutty Nair, is paying the tax and 4th plaintiff filed an objection before the Tahsildar, Kannur who directed payment of one half of the tax by plaintiffs and the remaining one half by first appellant and also directed to resolve the dispute in a civil court. Though the order was challenged in appeal before Sub Collector, the order was confirmed under Ext.A5 order. It was contended that the finding in the orders of the Tahsildar and Sub Collector are not correct and are illegal and plaintiffs are therefore entitled to a declaration of their status.

2. First appellant, in his written statement contended that Lakshmi Amma was not the sister of Parvathi Amma and there were only four members in the Thavazhi who were all signatories to Ext.A1 partition deed and item No.2 of the said properties was

alloted to Parvathi Amma and Ammalu and subsequently Ammalu released her right in favour of Parvathi Amma and earlier that property was enjoyed by Chandukutty Nair, father of first appellant and even after the partition, Chandukutty Nair was maintaining Parvathi Amma and her daughter and after the death of Chandukutty Nair, Parvathi Amma was living with first appellant and she did not execute any deed in favour of Lakshmi Amma and the claim of plaintiffs that they are the legal heirs of Parvathi Amma is not correct and Lakshmi Amma was only a dependant of Kambrath Tarwad and had no relationship whatsoever with deceased Parvathi Amma and therefore plaintiffs are not entitled to the decree sought for. It was also contended that as per Ext.A1 partition deed expenses of the Tarwad temple is to be met from the income of the properties. Hence plaintiffs got impleaded third defendant, as the President of the temple.

3. Learned Munsiff, on the evidence of PW1, Dws 1 & 2, and Exts.A1 to A5, and Exts.B1 to B12, granted a decree holding that Lakshmi Amma was the direct sister of Parvathi Amma and plaintiffs and second defendant, being children of Lakshmi Amma are the only legal heirs of deceased Parvathi Amma, as

her daughter Ammalu predeceased Parvathi Amma and their mother Uchira Amma was also not alive at the time of death of Parvathi Amma. That decree and judgment were challenged before Sub Court, Thalassery in A.S.7 of 1993. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. The second appeal was admitted formulating the following substantial questions of law.

1)Was the first appellate court justified in placing reliance on the recitals in Ext.A2, when mere recitals in the document do not establish right and do not bind the appellant.

2)In view of the significant omission of the name of Lakshmi Amma in Ext.A1 partition deed, does not an inference follows that Lakshmi Amma was not a member of the family and so not the sister of Parvathi Amma.

5. Learned counsel appearing for the appellant and respondents were heard. The argument of the learned counsel appearing for appellant is that the first appellate court did not reappreciate the evidence and had only confirmed the findings of the trial court, without independently considering the evidence

and therefore for that sole reason judgment of first appellate court is to be set aside. Relying on the Commentary Sarkar on Code of Civil Procedure it was argued that when an appeal is dismissed with costs or appeal rejected without giving reason, it is not a proper judgment at all and such judgment is to be set aside and appeal is to be remanded to first appellate court for fresh disposal in accordance with law. The learned counsel then argued that there is no evidence to prove that Lakshmi Amma, the mother of plaintiffs, was the sister of Parvathi Amma as found by courts below. It was also argued that Ext.A1 partition deed establish that Lakshmi Amma was not a member of the Thavazhi, as she was not a party to the partition deed and this fact was not properly appreciated by the courts below. It was further argued that explanation offered for non inclusion of Lakshmi Amma in Ext.A1 given by PW1 was not at all satisfactory and evidence of PW1 shows that he has no knowledge about even the relatives of Parvathi Amma and in such circumstances finding of courts below that evidence establish that Lakshmi Amma is the sister of Parvathi Amma is not sustainable. It was argued that the recitals in Ext.A2 should not have been relied on by courts below and in the absence of

other acceptable evidence, the recitals in Ext.A2 alone is insufficient to establish that Lakshmi Amma was the sister of Parvathi Amma and therefore findings of courts below are to be set aside.

6. Learned counsel appearing for the contesting respondents argued that in Ext.A2 assignment deed executed by Parvathi Amma, in favour of Lakshmi Amma, whereunder she assigned one half of her rights after she got released rights of her daughter Ammalu there is an unambiguous statement to the effect that Lakshmi Amma is the direct elder sister of Parvathi Amma and under Section 32(5) of Indian Evidence Act that statement is to be accepted and it establishes that Lakshmi Amma is the sister of Parvathi Amma, as rightly found by courts below. Reliance was placed on the decisions of the Apex Court in **K.V. Subbaraju V. C. Subbaraju**(AIR 1968 SC 947), **Dolgobinda V. Nimai Charan**(AIR 1959 SC 914) and High Court of Orissa in **Vaikuntam Mamikyamma V. Puppala**(AIR 1971 Orissa 49). Relying on Ext.A3 death certificate, which shows that Lakshmi Amma is Kambrath Lakshmi Amma as shown in Ext.A2, it was argued that under Section 35 of Indian Evidence Act, being a public document no further proof is

necessary with regard to the recitals in Ext.A3 and it establishes that Lakshmi Amma is not a dependant of Kambrath family as claimed by appellant but a member of Kambrath family and therefore finding of courts below that Lakshmi Amma is the sister of Parvathi Amma is perfectly correct. Reliance was placed on the decision of High Court of Patna in **Gopi Chand Arya** V. **Bedamo Kuer**(AIR 1966 Patna 231) and **Biswanath Gosain V.. Lalmuni**(AIR 1968 Patna 481). Learned counsel also argued that property of Parvathi Amma and Ammalu which was divided and jointly alloted under Ext.A1 is the property obtained by them under Ext.B1 will executed by Govindan Maniyani, their Uncle and not that of the Tarwad or Thavazhi and therefore only the legatees under the will are necessary parties to the partition deed and non inclusion of Lakshmi Amma, the sister of Parvathi Amma is therefore not at all relevant and will neither disprove the case of plaintiffs nor prove the case of appellants and there is no reason to interfere with the findings of courts below. Learned counsel also argued that in view of the evidence and factual position, the substantial questions of law as formulated will not actually arise for consideration.

7. Ext.A2 was relied upon by both the trial court and first

appellate court. Ext.A2 is the original assignment deed executed by Parvathi Amma in favour of Lakshmi Amma on 15.11.1962. At that time there was no dispute between the parties. Ext.A2 establishes that Parvathi Amma had asserted in the document that the assignee Kambrath Lakshmi is the direct sister of Parvathi Amma. The question is whether the said recital in Ext.A2 is a self-serving recital as argued by learned counsel appearing for appellant, or is a binding statement as argued by learned counsel appearing for respondents. That statement is made by Parvathi Amma at an undisputed point of time. It cannot be said that it is a self-serving statement of either Lakshmi Amma or her children. There was no necessity for Parvathi Amma at that point of time to execute an assignment deed containing incorrect facts and that too with regard to her relationship with Kambrath Lakshmi. Both the assignor Parvathi Amma and assignee Lakshmi Amma are not alive.

8. The learned counsel appearing for respondents relied on sub section 5 of Section 32 of Indian Evidence Act and argued that the statement in Ext.A2 is admissible and conclusively decides the relationship.

9. Sub section 5 of Section 32 reads:-

"32. **Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant** - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay of expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) **When it relates to cause of death:-**XXXXXXXXXXXXXXX

(2)XXXXXXXXXXXXXXXXXXX

(3)XXXXXXXXXXXXXXXXXXXX

(4)XXXXXXXXXXXXXXXXXXXX

5. **“ or relates to existence of relationship** - when the statement relates to the existence of any relationship(by blood, marriage or adoption) between persons as to whose relationship (by blood, marriage or adoption) the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised”.

10. Four conditions are to be satisfied before applying sub section 5 of Section 32. Firstly, the statement must be written or verbal and of relevant facts and must have been made by a person who is dead or cannot be found. Secondly, the statement must relate to the existence of any relationship by blood, marriage or adoption. Thirdly the person making the statement must have special means of knowledge as to the relationship in question. Lastly the statement must have been made before the

question in dispute was raised.

11. Apex Court in **Dolgobinda's** case (supra) had occasion to consider the value of a recital regarding the pedigree. Ext.1 in that case contained a pedigree which showed that Lokenath had three daughters by his first wife being Ahalya, Brindabati and Malabati. The document was signed by Sathyabadi on his behalf and on behalf of his brothers Baikuntha and Dasarath. Satyabadi was no more. It was contended that as the two others are alive, statement being a joint statement, it will not fulfil the conditions of Section 32(5). Their Lordships repelled the contention holding that as far as Satyabadi is concerned, as she is dead, her statement fulfils the conditions and therefore her statement with regard to predigree is admissible and relevant. Their Lordships held :

> "We therefore see no difficulty in treating the statements as to pedigree in Ext.1 as statements of a dead person as to the existence of a relationship by blood between Lokenath and his daughters Ahalya, Brindabati and Malabati - the

relationship which is in dispute now".

12. In **K.V. Subbaraju's case** (supra) a three judge bench of the Apex Court considered the statement regarding age of a person in a document, in the light of sub-section 5 of Section 32 of Indian Evidence Act. The position of law has been elaborately considered and laid down as follows:-

> "11. It is clear from sub-section (5) that if construed literally it is possible to contend that a statement regarding the age of the person concerned is not one relating to the existence of any relationship by blood or marriage or adoption. But such a literal construction is not a proper one as has been ruled in more that one decision. In Oriental Government Security Life Assurance Co.Ltd V. Narasimha Chari (1902) ILR 25 Mad 183, Bhashyam Ayyanger J following Ram Chandra Dutt V. Jogeshwar Narain Deo (1893) ILR 20 Cal 758 held that a statement

as to the age of a member of a family made by his deceased sister is admissible under S.32(5), the principle being that the time of one's birth relates to the commencement of one's relationship by blood and therefore a statement as to his age made by a person having special knowledge relates to the existence of such relationship. This observation was approved in Mohammed Syedol Ariffin V. Yeohoori Gark, 43 Ind App 256 = (AIR 1916 PC 242) where the Privy Council held that the questionof age in such a case falls within S.32(5) as it indicates the commencement of such relationship. In Gulab Thakur V. Fadali, 68 Ind Cas 566 = (AIR 1921 Nag 153) a statement by a person made when he was 36 years of age that he was adopted when he was 4

years old was held admissible after his death to prove the fact of his adoption as he possessed special knowledge about the relationship required by the section. It was also held that the fact that the person making the adoption died while the adoptee was too young to remember him would not be material as the latter would be able to declare that he had been adopted from that acquaintance with the history of his family which he would necessarily possess. Similarly, in Mst. Naima Khatun V. Basant Singh, AIR 1934 All 406 (FB) the High court of Allahabad following the decision in 43 Ind App 256 = (AIR 1916 PC 242) (supra) held that a statement as regards age is tantamount to a statement as to the existence of relationship. Therefore a statement

by an adoptive mother as regards the age of the adopted boy, although it would not show her own relationship with him was admissible. In Prolhad Chandra V. Ramsaran, AIR 1924 Cal 420 at p.422 the Calcutta High Court held that a statement in the Guardianship application as to the date of birth is admissible if the person who had made it is dead and had special means of knowledge of the relationship. This being the position under S.32(5) the statement made by Somaraju in his will that he was 19 years of age at the time of its execution was admissible and was rightly relied upon by both the trial court and the High Court as establishing that Somaraju was a major and was competent to make the said will".

13. In the light of the settled legal position the recitals about the relationship of Parvathy Amma with Lakshmi Amma, made by Parvathi Amma in Ext.A2 at a time when there was no dispute on these facts at all is to be accepted as correct. The statement is in writing and it relates to existence of relationship by blood between Lakshmi Amma and Parvathi Amma. It is a fact on which Parvathy Amma had special means of knowledge. It was made at a time when there was no dispute. Hence the statement in Ext.A2 that Kambrath Lakshmi Amma is her direct sister and the place of their residence are relevant and admissible facts which is to be relied on to resolve the dispute. Ext.A2 therefore proves that Kambrath Lakshmi Amma was the sister of Parvathi Amma.

14. A learned Single Judge of High Court of Orissa had considered statement of the husband about the second wife in a gift deed executed by the husband in **Vaikuntam Mamikyamma's case (supra).** It was held that **t**he statement of the husband, who is no more, is admissible under Section 32 (5) of Indian Evidence Act as it is a statement of fact, which is the dispute in that case. That decision supports the view taken

earlier.

15. In the light of the evidence, courts below rightly relied on Ext.A2 to hold that Kambrath Lakshmi Amma is the direct sister of Parvathi Amma as claimed by the plaintiffs. Ext.A3 being a death certificate and a public document and therefore admissible under Section 35 of the Evidence Act, also establishes that Lakshmi Amma was not a dependent of Kambrath Tarwad as claimed by appellant but was a member of Kambrath Tarwad which fortifies the claim of the plaintiffs that she was the sister of Parvathy Amma.

16. As rightly pointed out by learned counsel appearing for respondents, Ext.A1 partition deed shows that, properties divided thereunder are the properties belonging to Chandukutty Nair and Anandan, as well as the properties of Parvathy Amma and her daughter Ammalu and not the Tarwad properties or Thavazhy properties. The properties of Parvathi Amma and Ammalu, which was divided along with the properties of Chandukutty Nair and Anandan, was the property obtained by Parvathy Amma and Ammalu under Ext.B1 will executed by Govindan Manayani, their uncle. While dividing the properties obtained by Parvathi amma and Ammalu, Lakshmi Amma, the

sister of Parvathy Amma who was not one of the legatees under Ext.B1 was not a necessary party and therefore for the non-inclusion of Lakshmi Amma in Ext.A1 it cannot be held that Lakshmi Amma was not the sister of Parvathi Amma. Therefore for the non-inclusion of Lakshmi Amma in Ext.A1, it is not possible to hold that Lakshmi Amma is not the sister of Parvathy Amma or not even a member of Kambrath Tarwad as claimed by appellant.

17. In the light of the entire evidence, as rightly argued by learned counsel appearing for respondents, the substantial question of law formulated are not involed in the appeal. Under sub-section 5 of Section 100 of Code of Civil Procedure, a respondent is entitled to contend at the time of hearing the appeal that though court has formulated a substantial question of law, substantial question of law so formulated does not arise for consideration. On the facts and evidence of this case, the substantial questions of law as formulated are not at all involved in the appeal. There is no merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-